



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 05, 2022

IN THE MATTER OF:

Appeal Board No. 623891 A

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board Nos. 623888 and 623889, the claimant applied to the Appeal Board pursuant to Labor Law § 534 for a reopening and reconsideration of the

decisions of the Appeal Board, filed March 8, 2022, which modified the decisions of the Administrative Law Judge and sustained the initial determination holding the claimant ineligible to receive benefits, effective March 30, 2020, on the basis that the claimant was not capable of work, as modified to be effective March 30, 2020 through May 31, 2021; and sustained the initial determination charging the claimant with an overpayment of \$11,960 in regular unemployment insurance benefits recoverable pursuant to Labor Law §

597 (4), Federal Pandemic Unemployment Compensation (FPUC) benefits of \$16,800 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, Pandemic Emergency Unemployment Compensation (PEUC) benefits of \$16,100 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic

Security (CARES) Act of 2020, and Lost Wages Assistance (LWA) benefits of \$1,800 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), as modified in accordance with the modification of the initial determination holding the claimant not capable of work.

In Appeal Board Nos. 623890 and 623891, the claimant applied to the Appeal Board pursuant to Labor Law § 534 for a reopening and reconsideration of the

decisions of the Appeal Board, filed March 8, 2022, which modified the

decisions of the Administrative Law Judge and sustained the initial determination holding the claimant ineligible to receive benefits, effective March 30, 2020, on the basis that the claimant was not available for employment, as modified to be effective March 30, 2020 through May 31, 2021; and sustained the initial determination charging the claimant with an overpayment of \$11,960 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), Federal Pandemic Unemployment Compensation

(FPUC) benefits of \$16,800 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, Pandemic Emergency Unemployment Compensation (PEUC) benefits of \$16,100 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and Lost Wages Assistance (LWA) benefits of \$1,800 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), as modified in accordance with the modification of the initial determination holding the claimant not available for employment.

Upon consideration of the application to reopen, after due notice to the parties, the Board has decided to reopen and reconsider its decisions.

The Board makes the following:

FINDINGS OF FACT: The claimant worked full time as a security guard from May 11, 2019 through March 30, 2020, when he quit pursuant to medical advice because he would be at high risk of complications if he contracted COVID. The claimant's doctor advised him to stay home as much as possible.

The claimant filed a claim for benefits on April 9, 2020. He had access to and reviewed the Claimant Information Handbook, which stated that he would be denied benefits if he was: not ready, willing and able to work; not prepared to take a job immediately; or not physically or mentally capable of employment. To avoid contact with other people, the claimant stayed home and looked for work he could do online, especially in the real estate industry. The claimant did not have a real estate license and had not worked in the real estate industry. He also had no history of working online but planned on having his 35-year-old son help him. In addition to working as a security guard, the claimant had experience working as a taxi driver and operating a deli/grocery store. The employer sent the claimant a text message on or about April 28, 2020, asking him if he could come back to work. The claimant sent a reply text saying, "Good afternoon sir I will go back to work maybe after two

weeks not now. Thanks." The claimant avoided working outside his home from March 30, 2020 through the end of May 2021.

When he certified for benefits each week, the claimant was asked questions including "How many days were you NOT ready, willing and able to work?" Each time the claimant certified, he answered "0" to this question. The claimant received \$11,960.00 in regular unemployment benefits, \$16,100 in PEUC benefits, \$16,800.00 in FPUC benefits, and \$1,800.00 in LWA benefits. The Department of Labor redetermined the claimant's entitlement to benefits by issuing Notices of Determination mailed June 7, 2021.

OPINION: Pursuant to Labor Law § 597 (3), "[a]ny determination regarding a

benefit claim may, in the absence of fraud or [willful] misrepresentation, be reviewed only within one year from the date it is issued because of new or corrected information." In the present proceeding, we have determined in Appeal Board No. 618117 that the claimant made a willful misrepresentation with respect to the reason he was no longer working for his most recent employer. The claimant certified to separating from employment due to lack of work when in fact he knew that he quit. Because the claimant made a willful misrepresentation, the Department of Labor has jurisdiction to redetermine the claimant's benefits with respect to the entire period at issue.

The credible evidence establishes that the claimant avoided working outside his home from March 30, 2020 through the end of May 2021. He looked for work he could do online, especially in the real estate industry, but he had no history of doing online work and no real estate license or history of working in the real estate industry. The Appellate Division has held that "[a] claimant will not be deemed eligible to receive unemployment insurance benefits if he or she is not ready, willing and able to work in his or her usual employment or in any other for which he or she is reasonably fitted by training and experience" (see *Matter of Ormanian*, 167 AD3d 1183 [3d Dept 2018]). This standard applies with respect to both the claimant's capability of work and availability for work (see Labor Law § 591 [2]). As the claimant's

response to the pandemic was to limit his work search to types of work that were not consistent with his training and experience, the claimant was not capable of or available for work through the end of May 2021. Accordingly, we further conclude that the claimant is ineligible for benefits from March 30, 2020 through May 31, 2021.

The credible evidence further establishes that the claimant received \$11,960.00 in regular unemployment benefits, \$16,100 in PEUC benefits, \$16,800.00 in FPUC benefits, and \$1,800.00 in LWA benefits. The benefits paid with respect to the period when he was ineligible constitute an overpayment. The overpaid federal benefits are recoverable pursuant to federal law.

In our prior decision, we held that no testimony or evidence establishes that the claimant was on notice that he would not satisfy these requirements if he sought work online or in a new industry when he had no training or experience in these types of work. Therefore, the claimant did not know that, for purposes of the Unemployment Insurance Law, his weekly certifications to being ready, willing and able to work were incorrect. We now conclude that the claimant's false certifications thus reflect an error of law and, therefore, do not constitute willful misrepresentations or factually false statements (See, *Matter of Valvo*, 57 NY2d 116 (1982)). Accordingly, the regular unemployment insurance benefits that were overpaid are nonrecoverable.

With respect to the overpaid federal benefits, as the claimant is ineligible for benefits for the period from March 30, 2020 through May 31, 2021, the amount of the overpayment is referred to the Department of Labor for recalculation in accordance with this decision.

DECISION: The decisions of the Appeal Board are rescinded.

The decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 623888, the initial determination, holding the claimant ineligible to receive benefits, effective March 30, 2020, on the basis that the claimant was not capable of work, is modified to be effective March 30, 2020 through May 31, 2021, and, as so modified, is sustained.

In Appeal Board No. 623889, the initial determination, charging the claimant with an overpayment of \$11,960 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), Federal Pandemic Unemployment

Compensation (FPUC) benefits of \$16,800 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, Pandemic Emergency Unemployment Compensation (PEUC) benefits of \$16,100

recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and Lost Wages Assistance (LWA) benefits of \$1,800 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), is modified to hold the overpaid regular unemployment insurance benefits to be nonrecoverable and the overpaid FPUC, PEUC and LWA benefits to be recoverable, and, as so modified, is sustained.

In Appeal Board No. 623890, the initial determination, holding the claimant ineligible to receive benefits, effective March 30, 2020, on the basis that the claimant was not available for employment, is modified to be effective March 30, 2020 through May 31, 2021, and, as so modified, is sustained.

In Appeal Board No. 623891, the initial determination, charging the claimant with an overpayment of

\$11,960 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), Federal Pandemic Unemployment Compensation (FPUC)

benefits of \$16,800 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, Pandemic Emergency Unemployment Compensation (PEUC) benefits of \$16,100 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and Lost Wages Assistance (LWA) benefits of \$1,800 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), is modified to hold the overpaid regular unemployment insurance benefits to be nonrecoverable and the overpaid FPUC, PEUC and LWA benefits to be recoverable, and, as so modified, is sustained.

The claimant is denied benefits with respect to the issues decided herein.
(Al reclamante se le niegan beneficios con respecto a los temas decididos en el presente.)

MARILYN P. O'MARA, MEMBER